

CONTRACT LAW

2013 GDOT DBE Supportive Services Blueprint For Success
September 10, 2013
Emory Conference Center, Atlanta, GA

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THE ANDERSON FIRM, LLC



“He who fails to plan, plans to fail.”

Proverb quote.



Planning & Preparation

THINGS TO DO
BEFORE
YOU CONTRACT

DUE DILIGENCE

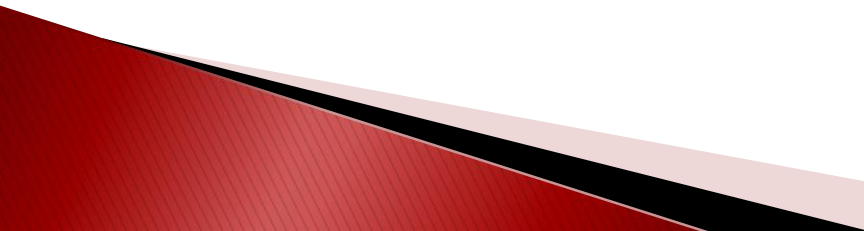
It's True! Knowledge Is Power.

Know your company's business

- Business Development: Exploit GDOT Opportunities & Industry Contacts
 - Product/Service Offerings
 - What your services/goods are worth
 - Capabilities (past & present performance)
 - Team (owners, partners, employees, bonding company, etc.)
 - Constraints (financial, experience & otherwise)
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DUE DILIGENCE CONTINUED

Make sure your house is in order

- Licenses
 - Certifications
 - Bonding, if applicable
 - Entity status/compliance with State
 - Insurance (General Liability & Worker's Comp)
 - Status of pending claims, lawsuits, settlements
 - Key personnel/subs are on board
 - Required Documentation for Employees, Independent Contractors & Sub-Contractors
 - Executed Teaming or JV Agreements
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DUE DILIGENCE CONTINUED

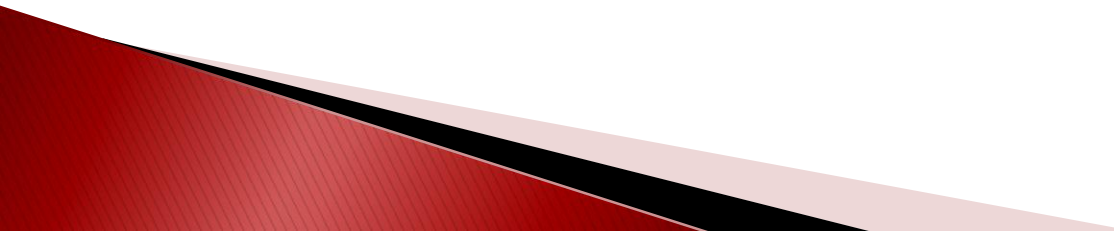
Homework Prior to Negotiating Any Contract

1. Research/Update Yourself on:
 - a) The other side
 - b) Publicly available information about
 - I. the project;
 - II. the RFP; and
 - III. prime's contract with the owner (GDOT)
 - c) Current market pricing
2. Analyze Business & Contract Requirements

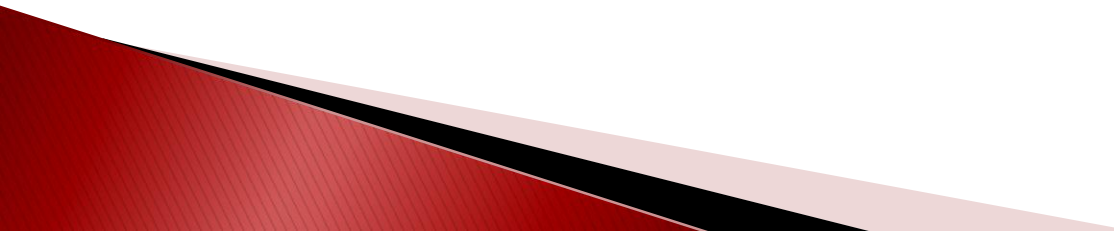
DUE DILIGENCE CONTINUED

Now, Based on Your Review of RFP:

1. Define Your Terms

- a) Expectations
 - b) Scope of work
 - c) Costs of goods/services
 - d) Essential prerequisites or terms and conditions
(assumptions, exclusions, bonding capacity, etc.)
 - e) Potential liabilities & risks
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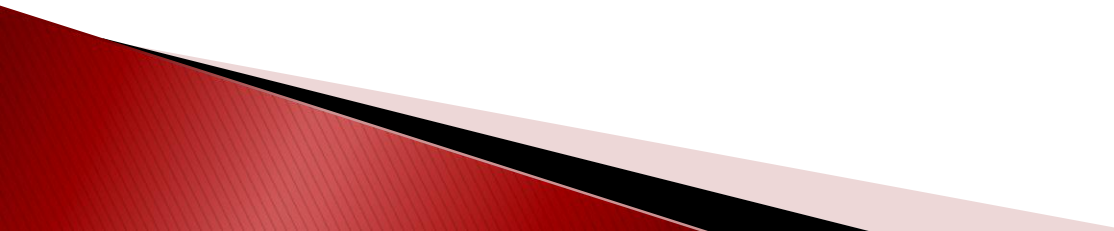
Questions to Pose Regarding Contract Drafting

1. Who will draft?
 2. How are comments/revisions to be handled?
 3. Will there be redlining or old-schoolin'?
 4. How will versions be disseminated?
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NEGOTIATING TIPS

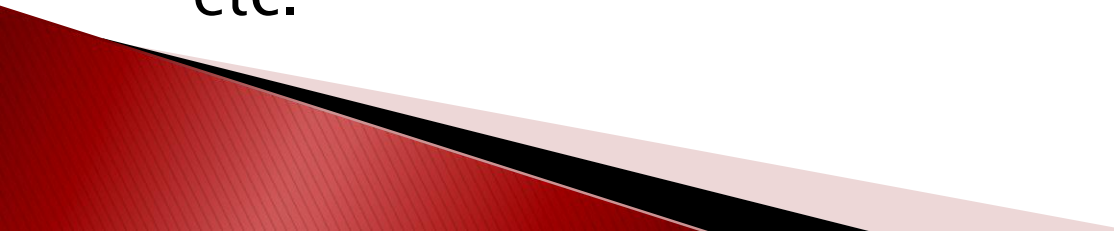
- ▶ Approach from a partnering versus a defensive, aggressive or submissive standpoint
- ▶ Be clear on your objectives
- ▶ Know what's a priority
- ▶ List and rank your priorities (discuss what's most important first)
- ▶ Refer to least important items if you have to give up something to get your top priorities
- ▶ Only negotiate with person who has authority to negotiate
- ▶ Know when to walk away
 - your bottom line is your bottom line

KEY TERMS/PROVISIONS

- ▶ Legal Name of Other Party & Your Company
 - ▶ Effective date, start date, project completion date/goods delivery date, dates when penalties/damages start, termination date
 - ▶ Scope of Work
 - ▶ Responsibilities (i.e., permits, licenses, rules, inspections, on-site supervisor, work hours, etc.)
 - ▶ Payment Terms & Grounds for Withholding \$\$
 - ▶ Work Site Access Rights
 - ▶ Acceptance of Work
 - ▶ Guarantees and post-contract obligations
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KEY TERMS/PROVISIONS

CONTINUED

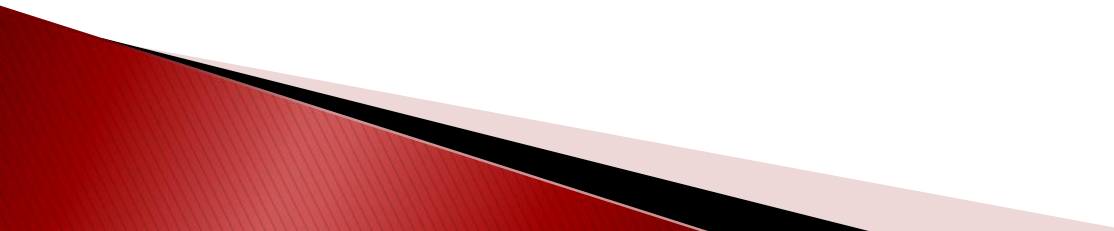
- ▶ Dispute Resolution Process
 - ▶ Indemnity
 - ▶ Termination (Process, Notice Req'd, Cure Period, etc.)
 - ▶ Penalties & Liquidated Damages, If Any
 - ▶ Remedy/action to be taken for unforeseen delays or costs
 - ▶ If government regulations/laws are violated, who is responsible?
 - ▶ Effect of 3rd parties, surrounding areas, responsibility for collaborations with other subs, necessary “amenities” & clean-up
 - ▶ Change orders and/or changes in requirements, time, etc.
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Read this twice:

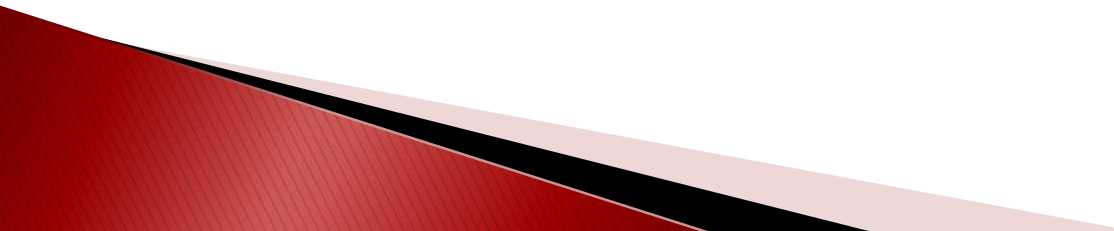
Read the ENTIRE contract

- ▶ Start from page one to final page (from top to bottom)
- ▶ Make Comments & Revisions, If Needed
- ▶ Collect Comments From Your Attorney/Advisors/Key Team Members
- ▶ Discuss All Comments With Attorney/Advisors/Team Before Talking to Other Side
- ▶ Cross-check all versions:
 - against earlier versions, notes, term sheets, etc.
 - note & discuss inconsistencies
- ▶ Watch out for “and” “or” “shall” “must” “may” “best efforts” “TBD”
- ▶ Are the Effective date, start date, payment dates, and termination date acceptable?
- ▶ Make sure technical terms or complicated provisions are clearly defined or outlined

DON'T SKIP OR SKIM OVER THE BOILERPLATE/MISCELLANEOUS

- ▶ That's All Folks:
 - The Entire Agreement
 - ▶ Location, Location, Location:
 - Governing Law
 - ▶ Not Without My John/Jane Hancock:
 - Amendments/Modifications/Change Orders
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EVALUATING THE PROPOSED CONTRACT

- ▶ Proofread final contract and confirm all changes were made
 - ▶ No “solo rodeo” in contracts – get other eyes on it, including your attorney if you have one
 - ▶ Never sign on the spot -- take at least a few days
 - ▶ Make sure you understand every duty, obligation and word
 - ▶ Create a checklist & review terms discussed, needed and agreed upon and considered
 - ▶ Make sure all oral representations & promises have been put in writing
 - ▶ What’s incorporated into contract (contract documents, notes & specifications, rules, regulations, etc.)
 - ▶ Wait! Is anything missing?
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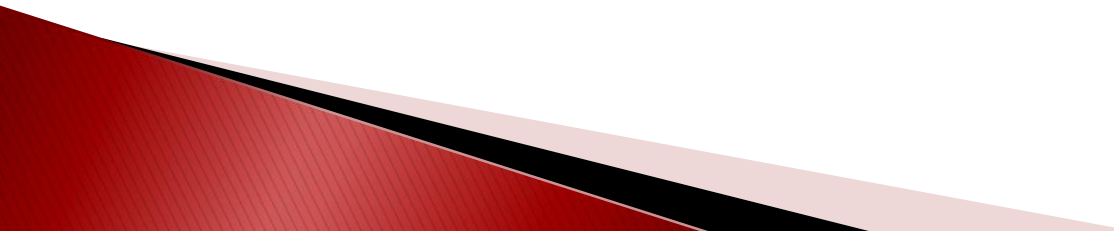
EXECUTING THE CONTRACT

- ▶ Make sure all agreed to changes have been accurately made
- ▶ Confirm date of contract and/or effective date
- ▶ Process for execution:
 - in-person, two originals, and/or initialed pages, etc.
- ▶ Make sure you sign the final version
- ▶ Get the other side's execution

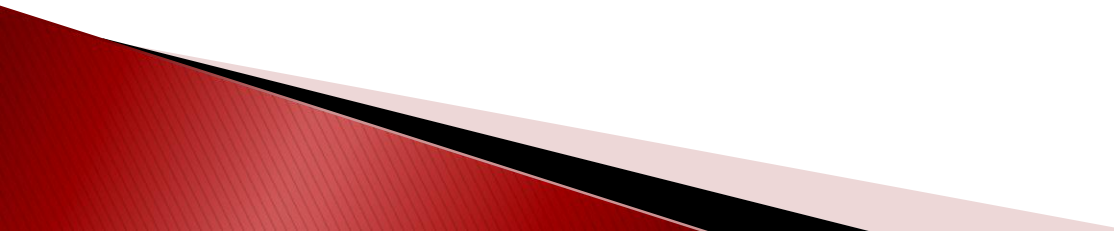
The Contract Is Fully Executed. Now What?

- ▶ Calendar significant dates for deliverables & performance
- ▶ Set up reminders/alerts
- ▶ Develop implementation plan
- ▶ Scan/keep electronic and hard copy of all contracts
- ▶ Keep all written communications involving project (emails, faxes, letters, etc.)
- ▶ Consider separate email for all project communications
(communicationsforproject123@xyzco.com)

THINGS/ACTIONS TO AVOID

- ▶ Starting Work Without A Fully-Executed Contract
 - ▶ Failing to Notify Prime of Issues (breach of contract, unapproved amendments, work outside scope of work, inability to perform in accordance with contract, lack of response to issues Prime notified you of)
 - ▶ Internal Transactions That Affect DBE Status and Contract
 - ▶ Failing to Have Internal Risk Management or Dispute Resolution Procedures for Team
 - ▶ Failing to Document & Have Written Confirmations
 - ▶ Failing to Memorialize Change Orders
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THINGS TO CELEBRATE

1. Your fully & competently participating in the contracting process.
 2. The alleviation of common problems due to poor contracting skills.
 3. Your continued success!
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THANK YOU!

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